SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

EFRAIN GALICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, JOHNNY GARCIA and MIGUEL VILLALOBOS,

Plaintiffs,

-against-

DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER and JOHN DOES 1-4,

Defendants.

AFFIRMATION OF NATHANIEL K. CHARNY IN SUPPORT OF ORDER TO SHOW CAUSE

Index No. 24973/15E

Hon. Fernando Tapia, J.S.C.

NATHANIEL K. CHARNY, an attorney duly admitted to practice law before the Courts of the State of New York, affirms under penalty of perjury as follows.

1. My firm (Charny & Wheeler) is co-counsel for Plaintiffs in this matter along with Eisner & Dictor, P.C. (Benjamin Dictor) and Roger J. Bernstein, Esq. I am familiar with the facts and circumstances of this case. I make this Affirmation in support of Plaintiffs' motion for an Order compelling Defendant Donald J. Trump's attendance at the trial in this action scheduled to begin on March 6, 2019.

2. No prior application has been made for the relief sought herein.

INTRODUCTION

3. Defendant Trump has been properly served with a subpoena ad testificandum to testify at the trial in this case beginning on March 6, 2019. Instead of seeking relief under CPLR 2304 through a motion to quash, fix conditions or modify the subpoena, Defendant Trump has engaged in self-help, to wit, sending a letter to Plaintiffs' counsel "rejecting" the subpoena.

4. While the CPLR offers significant remedies should Defendant Trump ignore the subpoena and his obligation to this Court as he apparently intends,[1] Plaintiffs choose instead to seek judicial intervention to join issue before March 6th as to the manner in which Bronx County Supreme Court will compel Defendant Trump's testimony at the trial in this matter.

5. It is submitted that there is no basis, legal, factual or otherwise, for the claim that this Court should not compel Defendant Trump's appearance. The only question under controlling law is the place and manner of Defendant Trump's appearance.

PROCEDURAL POSTURE

6. The claims herein arise out of the events of September 3, 2015, when the Plaintiffs were on a public sidewalk carrying signs to protest what Plaintiffs believed to be Defendant Trump's racist beliefs regarding immigrants. On that date, several of Defendant Trump's bodyguards, including his confidant and chief security officer Keith Schiller, stormed Plaintiffs, pushed some of them down the sidewalk, using excessive force grabbed the signs from Plaintiffs and converted them to their own use, and punched one of the protestors in the head in their efforts to stop the public speech and convert Plaintiffs' property.

7. After disclosure Defendants moved for summary judgment. Their motion was denied by Justice Tapia with respect to Plaintiffs' assault and battery and conversion causes of action against all of the Defendants, including Defendant Trump. Judge Tapia instructed that the matter proceed to trial. NYSECF Doc. No. 332 (Exhibit 1 hereto).

8. With regard to Defendant Trump, Justice Tapia found more than sufficient evidence of Defendant Trump's involvement in the conduct at issue. Justice Tapia explains in

[1] See CPLR 2308 (listing available remedies for disobedience of a judicial subpoena).

his Decision that there is ample evidence of Defendant Trump's dominion and control over the other defendants:

> In this analysis of the doctrine of respondeat superior, it must be noted the apparent association between defendants Trump, Trump Organization, and Trump Campaign, or synonymously the man, his company, and his campaign. Defendants' motion to disassociate the actions of Schiller, Uher, and Deck from Trump, his namesake company, and campaign as a matter of law is unavailing. To the contrary, plaintiffs raise ample issues of fact that contrary to moving defendants' claims, tends to exhibit Trump's dominion and control over Schiller, Uher, and Deck.
>
> Plaintiffs point out that Trump authorized and condoned the specific type of conduct of defendants Schiller, Uher, and Deck. Furthermore, plaintiffs proffer evidence that indicates Trump's knowledge of the altercation and subsequent seizure of the banner. The employment relationship between Uher and Deck and Trump Campaign is also a disputed issue of fact.
>
> Finally, the plaintiffs presented evidence that illustrates the close relationship between Trump and Schiller, indicating Trump's behest guided Schiller's actions. The fluidity of Schiller, Uher, and Deck's employment between Trump, Trump Campaign and Trump Organization present issues of facts that need to be addressed at trial.

Ex. 1 at pp. 5-6 (footnotes with record citations omitted).

9. On January 14, 2019, all counsel appeared before the pretrial part. On consent, without objection by any party or counsel, this matter is scheduled for a date certain of March 6, 2019 to pick a jury and thereafter start the trial.

SERVICE OF A SUBPOENA AD
TESTIFICANDUM AND ITS "REJECTION" BY DEFENDANT TRUMP

10. On December 28, 2018, Plaintiffs subpoenaed among others Defendant Trump to appear ad testificandum at the trial. A copy of this subpoena and affirmation of service is submitted as Exhibit 2 to this affirmation.

11. By letter dated January 11, 2019 Defendant Trump's counsel (Lawrence S. Rosen) purported to "reject" said properly served subpoena ad testificandum and articulated arguments that Defendant Trump's counsel claim support their "rejection." A copy of the communication from Defendant Trump's counsel is submitted as Exhibit 3.

12. On January 14, 2019, I appeared in the PT Part with all counsel for purposes of scheduling the trial in this matter. At that time, Defendant Trump's counsel stated to me without ambiguity that Defendant Trump had no intention of making a motion to quash the subpoena, asserted that his purported "rejection" was sufficient and stated that Defendant Trump would not be appearing for testimony at trial.

13. Because New York law is exactly the opposite of Defendant Trump's intended conduct, the instant application is being made.

POINT ONE

THERE IS NO BASIS TO "REJECT" A SUBPOENA

14. There is no CPLR provision, or cognizable practice, that allows a party to simply "reject" a subpoena ad testificandum.

15. The closest possible justification for Defendant Trump's purported right to reject a subpoena is CPLR 2101(f), which allows "return" where there is a defect "in the form of a paper." CPLR 2101(f).

16. This provision does not apply because there is no defect as to form, and none has been stated by Defendant Trump. Defendant Trump's objections, as stated in his "rejection" letter (Exhibit 2) are exclusively substantive, and not procedural.

17. There is no recognizable basis for Defendant Trump to simply "reject" the subpoena.

POINT TWO

DEFENDANT TRUMP MUST COMPLY WITH THE SUBPOENA

18. It has been long held that "the right to issue a subpoena ad testificandum is absolute." Turin Housing Development Fund Co. v. Suarez, 50 Misc. 3d 1220(A), 2016 WL 688800 at *6, (N.Y.City Civ.Ct., 2016) (citing Evercore Partners Inc. v. Lazard Freres & Co., LLC, 2011 NY Slip Op 32906(U), 2011 N.Y. Misc. LEXIS 5243, 3-4 (N.Y. County 2011));[2] see also Beach v. Shanley, 62 N.Y.2d 241, 247, 465 N.E.2d 304, 307 (1984); Hirshfield v. Craig, 239 N.Y. 98, 117, 145 N.E. 816, 822 (1924).

19. In New York State Com'n on Government Integrity v. Congel, 156 A.D.2d 274, 280, 548 N.Y.S.2d 663, 668 (1st Dept. 1989), the First Department explains:

> [A party] indisputably has the power to compel the attendance of witnesses, and, accordingly, no legal wrong will be suffered by the respondents if they are forced to appear pursuant to the subpoenas' command . . . The long established rule is that privilege may not be used as a ground to quash a subpoena ad testificandum in advance of compliance[.] Simply stated, privileges may not be asserted in advance of questions actually propounded.

Id.

20. Given the reality of Defendant Trump's status as a party, and that the subpoena is ad testificandum, Defendant Trump is obligated to comply with the subpoena and appear for trial testimony. 23/23 Communications Corp., d/b/a Communications Diversified v. General Motors Corporation, 172 Misc.2d 821, 824, 660 N.Y.S.2d 296, 298 (N.Y.County 1997) (citing authority); Matter of Ocean-Clear v Continental Cas. Co., 94 A.D.2d 717, 718-19, 462 N.Y.S.2d 251, 253, (2d Dept. 1983) ("a witness subject to a subpoena ad testificandum cannot raise an

[2] Copies of these two slip opinions (Turn Housing and Evercore Partners) are submitted under Exhibit 4.

issue of privilege until he has actually appeared and been questioned"); Evercore Partners, 2011 N.Y. Slip Op. 32906(U) at p. 2, 2011 WL 5358507 at *2 (quoting Chief Judge Cardozo and explaining: "on a motion to quash a subpoena the relevancy of the proposed testimony cannot be challenged").

POINT THREE

DEFENDANT TRUMP'S "WAIVER" ARGUMENT IS FRIVOLOUS

21. In his counsel's letter "rejecting" the subpoena, Defendant Trump argues that Plaintiffs have waived the right to subpoena Defendant Trump to appear at trial because Plaintiffs did not take Defendant Trump's deposition during discovery. Ex. 2 at p. 2 (arguing: "after no less than ten pretrial depositions, the Plaintiff's elected to serve and file their note of issue certifying that all discovery was complete, without re-noticing the deposition of [Defendant] Trump or seeking to renew their motion to compel his deposition" (emphasis in original)).

22. This argument is frivolous. As has been long established, there is no such thing as waiving a party's right to call witnesses to trial based on the scope of discovery. Instead "[t]here is no requirement that a party depose a witness in order to call him or her as a witness at trial." Gonzalez v. City of New York, 151 A.D.3d 629, 632, 58 N.Y.S.3d 331, 333 (1st Dept. 2017); Adoptante v. The City of New York, 2018 WL 3223137 (N.Y.Sup.) (Trial Order) at p. 3, 2018 WL 3223137 at *4 (Richmond Cty. 2018) (citing cases).

23. Justice Falanga explains the black letter rule:

> Proffered evidence before a trial judge is not to be limited by the scope of what passed between counsel in pretrial disclosure. For tactical, costs or other good reasons, a party may choose not to do extensive disclosure and yet may proceed to trial. They should not be limited because they did not take advantage of their pretrial rights.

L.F. v. K.F., 958 N.Y.S.2d 646, 30 Misc. 3d 1209(A), 2010 N.Y. Slip Op. 52336(U) at p. 2, 2010 WL 5566828, at *2 (Nassau County 2010).

24. The waiver argument is even more inapposite as it relies upon a baseless interpretation of Clinton v. Jones, 520 U.S. 681, 117 S.Ct. 1636 (1997). Defendant Trump would have the Court conclude that Clinton v. Jones stands for the proposition that there is a "required procedure for compelling testimony from a sitting President [in a state court]." That is, according to Defendant Trump's counsel, a sitting president's testimony is mandated to be: (i) exclusively by video tape; (ii) taken at the White House; and (iii) occurs only as part of discovery. See Ex. 3 at p. 2.

25. First, Clinton v. Jones has nothing to do with limiting trial testimony. Instead it stands for the nearly-opposite proposition that a sitting President has no immunity from litigation arising out of his personal conduct prior to taking office -- exactly the situation here. Clinton, 520 U.S. at 695 117 S.Ct. at 1644 ("Petitioner's effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent.").

26. Second, the opening sentence of the paragraph in Clinton v. Jones cited by Defendant Trump is an explicit caveat that the Court's holding has no bearing on the instant question, explaining: "[O]ur decision rejecting the immunity claim and allowing the case to proceed does not require us to confront the question whether a court may compel the attendance of the President at any specific time or place." Clinton v. Jones, (1997) 520 U.S. at 691-692, 117 S.Ct. at 1643.

27. There is no legally cognizable "waiver" argument to be held against the Plaintiffs and any promotion of same by Defendant Trump should be rejected as frivolous.

POINT FOUR

DEFENDANT TRUMP'S IMMUNITY DEFENSE IS WAIVED AND IN ANY CASE IRRELEVANT TO THE SUBPOENA

28. Defendant Trump offers only one other objection which is premised entirely on a defense immunity under the Supremacy Clause that he has pled in a different case,[3] but never interposed in this matter. On that basis alone, his "immunity" argument should be rejected as waived. In any case, the immunity defense is irrelevant to the subpoena ad testificandum at issue here.

29. Waiver. The immunity defense has been waived. Defendant Trump has never pled or asserted any such immunity defense, or even anything remotely similar. CPLR 3018(b); Butler v. Catinella, 58 A.D.3d 145, 150, 868 N.Y.S.2d 101, 106 (2d Dept. 2008).

30. In the varied motion practice to date in this matter, including Defendant Trump's motion for summary judgment, no mention has been made to the Court of an immunity defense or of Defendant Trump's claimed entitlement to same.

31. On February 14, 2017, Plaintiffs filed their Note of Issue and Certificate of Readiness for Trial (NYSECF Doc. No. 144). Defendant Trump has affirmed his readiness for trial by failing to seek to vacate the Certificate of Readiness within the twenty days allowed by the Rules. Schroeder v. IESI NY Corp., 24 A.D.3d 180, 181, 805 N.Y.S.2d 79, 81 (1st Dept. 2005).

[3] In both of these cases, the Supreme Court has rejected the claimed defense with notable prejudice. See People by Underwood v. Trump, 88 N.Y.S.3d 830, 835, 2018 WL 6166296 (N.Y.County 2018) (misfeasance re Trump Foundation) and Zervos v. Trump, 59 Misc.3d 790, 792, 74 N.Y.S.3d 442, 444 (N.Y.County 2018) ("No one is above the law. It is settled that the President of the United States has no immunity and is 'subject to the laws' for purely private acts."). The Zervos decision is on appeal to the First Department.

32. And dispositively, on January 14, 2019 (only two weeks ago), Defendant Trump's lawyers stated to the Court that Defendant Trump is prepared to stand for trial on March 6, 2019, and defend the claims made against him.

33. Irrelevance. Should the Court choose to forgive Defendant Trump's waiver of the immunity defense, it is nonetheless irrelevant to the subpoena ad testificandum. Defendant Trump even as a non-party must be compelled to appear for all of the same reasons set out above because he is the principal of a party corporate defendant. Standard Fruit & S. S. Co. v. Waterfront Commission of New York Harbor, 43 N.Y.2d 11, 15, 371 N.E.2d 453, 455 (1977); Gyani v. Great Neck Medical Group, 35 Misc.3d 278, 280-281, 936 N.Y.S.2d 534, 535-536 (Nassau Cty. 2012) (Per CPLR 2302-a, "[a] corporation amenable to the jurisdiction of New York court may be subpoenaed to produce a person under its control that has knowledge of the transaction at issue. . . ").

POINT FIVE

THE DOCTRINE OF LACHES PROHIBITS ANY REFUSAL TO TESTIFY

34. "Laches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party . . . Prejudice may be demonstrated by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay." White v Priester, 912 N.Y.S.2d 127, 129–30, 2010 WL 4907146 at *2 (2d Dept. 2010).

35. The right at issue here for purposes of laches is the purported immunity defense being raised as an excuse to avoid appearance in this matter. This immunity defense has never been raised to the Court in this matter, even to this day. This is a self-evident "neglect or omission to assert a right. . ." Id.

36. The prejudice if this argument is applied as Defendant Trump proposes is also apparent; Plaintiffs will be precluded from effectuating their "absolute right" to call Defendant Trump as a witness in this trial. This is the very type of prejudice envisioned by the rule of laches.

37. If the Court affirms Defendant Trump's delusory argument, the resulting prejudice is significant, against all precedent, and therefore barred by the doctrine of laches.

THE PROPOSED REMEDY

38. Unless and until Defendant Trump proffers cause for modification and/or conditions regarding the subpoena, it is submitted that Plaintiffs are entitled to an order compelling Defendant Trump to appear on March 6, 2019 in Bronx County Supreme Court and all days continuing thereafter as necessary per the subpoena ad testificandum.

39. In his "rejection" letter, Defendant Trump implies that he would be available for trial testimony per his proffered interpretation of Clinton, that is by way of "a pre-trial deposition at the White House." Ex. 3 at p. 2. Plaintiffs submit instead that live testimony is preferred. It is, as Justice Modica explains, "imperative to both sides that the [party] be subjected to live questioning. The jury will then be in a better position to assess [his] demeanor. A stenographic deposition presented to the jury could simply never accomplish that; and a videotaped deposition simply lacks the same force and effect that is inherent in real-time testimony." Nelson for Chirdo v. City of New York, 60 Misc. 3d 353, 358-59, 77 N.Y.S.3d 262, 266-67 (Queens Cty. 2018).[4]

[4] In the Nelson for Chirdo matter, the party was too infirm to travel and instead the Court compelled her live testimony by video conferencing. Nelson for Chirdo, 60 Misc.3d at 359, 77 N.Y.S.3d at 267 ("Frankly, the ruling in this case benefits both sides and promotes the ends of justice.").

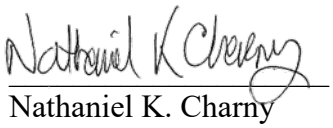
CONCLUSION

40. For these reasons, as well as on the entire record before the Court, it is submitted that the instant application should be granted and that the Court should issue an Order compelling Defendant Trump's live appearance for testimony in Bronx County Supreme Court on March 6, 2019 and continuing thereafter as necessary.

41. In the alternative, the Court should so-Order appropriate fixed conditions or modifications to the subpoena that are necessary but that will nonetheless ensure Defendant Trump's compliance with the subpoena ad testificandum.

Dated: Rhinebeck, New York
January 30, 2019

Respectfully submitted:



Nathaniel K. Charny

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

EFRAIN GALICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, JOHNNY GARCIA and MIGUEL VILLALOBOS,

Plaintiffs,

-against-

DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER, and JOHN DOES 1-4,

Defendants.

Index No. 24973/2015E
Hon. Fernando Tapia

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached are true and correct copies of the Decision and Order by the Hon. Fernando Tapia, J.S.C., dated August 20, 2018 which was entered by the Bronx County Clerk's Office on August 21, 2018 with respect to motions nos. 6 and 7.

Dated: New York, New York
August 21, 2018

ROGER J. BERNSTEIN

By: _____

Roger J. Bernstein
535 Fifth Avenue, 35th Floor
New York, NY 10017
(212) 748-4800
rbernstein@rjblaw.com

EISNER & ASSOCIATES, P.C.

By: _____

Benjamin N. Dictor
39 Broadway, Suite 1540
New York, NY 10006
(212) 473-8700
ben@eisnerassociates.com

Counsel for Plaintiffs

TO: Counsel of Record for All Defendants (by NYSCEF)

PART 13

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

GALICIA, EFRAIN Index №. **0024973/2015**

-against- Hon. **FERNANDO TAPIA,**

TRUMP, DONALD J Justice Supreme Court

----------X [006]

The following papers numbered 1 to ____ Read on this motion, **SUMMARY JUDGEMENT DEFENDANT** Noticed on **August 01 2017** and duly submitted as No. ____ on the Motion Calendar of ____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

SEE ANNEXED DECISION & ORDER.

Motion is Respectfully Referred to:
Justice: ____
Dated: ____

Dated: 8/20/2018

Hon. _____
FERNANDO TAPIA, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13

EFRAIN GALICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, JOHNNY GARCIA & MIGUEL VILLAOBOS

Plaintiffs,

- against -

DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER, GARY UHER, EDWARD JON DECK, JR., AND JOHN DOES 3-4,

Defendants.

Index: 24973-2015E

Hon. Fernando Tapia, J.S.C.

DECISION

Plaintiffs bring this action against defendants alleging assault and battery, conversion and destruction of property, negligent hiring and supervision. Defendants Donald J. Trump (Trump), The Trump Organization, LLC (Trump Organization), and Keith Schiller move for an order under CPLR 3212 granting summary judgment in favor of the defendants. The remaining defendants, Donald J. Trump for President, Inc (Trump Campaign), Gary Uher, Edward Jon Deck, Jr in a similar motion move for the same relief. This decision will address both motions.

I. Assault and Battery

Defendants argue that plaintiff Perez assault and battery claim must fail as she was unsuccessful in coming forward with evidentiary proof sufficient to demonstrate who precisely committed an assault or battery against her. Perez testified at her deposition that a "short" and "dark-skin" security guard that came out of Trump tower and identified himself as working for defendant Trump touched her without consent. [1] Perez further testified that the security guard

[1] Perez tr at 35-39.

who touched her asked to her to remove her costume and "leave the place." [2] Defendant Deck testified that he approached a female protestor wearing a Ku Klux Klan costume and told her "you guys need to move because this is not - it's not a safe environment." [3] The issue of whether defendant Deck was, in fact, the same individual as alleged by Perez or possibly one of the John Doe defendants, plaintiff argues, would be a question of fact [4] for the jury to determine. In either instance, if it is found that Deck or defendant John Doe had, in fact, made contact with Perez, defendants Trump, Trump Organization, and Trump Campaign would be liable under the doctrine of respondeat superior. Under the doctrine of respondeat superior, an employer may be held vicariously responsible for a tort committed by his or her employee within the scope of employment. [5] Defendants have failed to meet their prima facie burden of entitlement to judgment on Perez's claim as a matter of law.

Defendants also seek to dismiss plaintiff Galicia assault and battery claim on the grounds that Schiller was acting in self-defense when he assaulted him. "The necessity of protecting one's self against attack is a defense against liability for assault and battery as a justification for acts which otherwise would constitute the tort." [6] The facts surrounding the altercation between Schiller and Galicia are disputed. Plaintiff asserts that the assault by defendant Schiller on Galicia took place when Schiller made physical contact with Galicia by tearing away a sign from Mr. Galicia's hand. [7] Defendants contrarily assert that Schiller had removed a sign that was impeding traffic and Galicia, in fact, was the one who initiated the contact. [8] After this initial

---

[2] *Id* at 38, lines 11-12.
[3] Deck tr at 96-97.
[4] *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 852 (1985) (On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case").
[5] *Jones v Hiro Cocktail Lounge*, 139 AD3d 608 (1st Dept. 2016).
[6] 6A NY Jur Assault -- Civil Aspects § 11.
[7] Galicia tr at 79-81.
[8] Schiller tr at 105-106, 124-125, 132-133.

contact by Galicia, defendants assert, Schiller acted in self-defense in repelling Galacia off his person. [9] Questions of facts abound; defendants have failed to eliminate material issues of facts from this case.

Furthermore, Galicia in action for a tortious battery can recover damages for pain and suffering. Those damages can be found in the testimony of the plaintiff alone. [10] Mr. Galicia went to Lincoln Hospital where he complained of pain and anxiety. [11] Plaintiff's subjective testimony of pain may be sufficient to establish an injury for which he or she is entitled to some compensation. Summary judgment on Galicia's assault and battery claims are denied.

II. Conversion & Destruction of Property

In this claim, it is alleged that defendants took possession of plaintiffs' banners without their consent by forcibly taking from them while they stood on the public sidewalk in front of Trump Tower. [12] "To establish a claim for conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or the exclusion of the plaintiff's rights." [13] Defendants assert that plaintiff has failed to establish the signs were altered or that the plaintiffs were deprived of their ability to use them.

To the contrary, plaintiffs posit that defendant Schiller tore one of the signs and then took possession of their banner for six weeks. [14] Plaintiffs by submitting evidence of damage to one of the signs by Schiller and the unlawful confiscation of the banner to the exclusion of the

---

[9] *Id.*
[10] *See McCombs v. Hegarty*, 205 Misc. 937, 130 N.Y.S.2d 547; *Levine v Abergel*, 127 AD2d 822 (2nd Dept 1987).
[11] Galicia tr at 97-106.
[12] Galicia tr at 72-81.
[13] *A & G Research, Inv. v. GC Metrics, Inc.*, 19 Misc.3d 1136[A (N.Y.Sup.Ct. 2008) *citing Independence Discount Corp. v. Bressner,* 47 A.D.2d 756 (2d Dept.1975).
[14] Galicia tr 81.

plaintiff's rights have met their prima facie burden. The assertion that plaintiffs must prove their intended use of the signs while the signs were in defendants' possession is without merit. Defendants fail to provide any legal precedent for this notion. Summary judgment on the conversion and destruction claim is denied.

III. Negligent Hiring, Retention & Supervision

The court next examines whether defendants Trump Organization or Mr. Trump met their burden for summary judgment on the claim that they cannot be found liable for defendants Schiller, Deck and Uher's intentional tort under the theory of negligent hiring, retention, and supervision. Defendants argue that this claim must be dismissed, citing *Karoon v New York City Transit Authority,* [15]

> **"Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention. This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training."**

Defendants argue since the acts were within the scope of Schiller, Deck and Uher employments, the plaintiffs cannot maintain a claim against their employers for negligent hiring or supervision. They additionally argue that plaintiffs' claim for negligent hiring, retention, and supervision fails as a matter of law since the record is devoid of any evidence that they knew or should have known [16] of Schiller, Deck and Uher's propensity for violence or assaultive

[15] 241 AD2d 323 (1st Dept 1997).
[16] *Sheila C. Povich*, 11 AD3d 120, 129-130 (1st Dept 2004) (employer knew or should have known of the employee's "propensity for the sort of conduct that caused the injury").

behavior. Plaintiffs in their opposition failed to present any theory as to how this alleged intentional tort was outside the scope of these employees' duties and furthermore provided no proof of any prior bad acts or disciplinary actions that would indicate a propensity for the alleged tortious conduct. Plaintiffs cause of action for negligent hiring, retention, and supervision is dismissed.

IV. Respondeat Superior

The doctrine of respondeat superior generally imposes liability for acts of an employee upon the employer if the employee was acting within the scope of his employment. [17] Determination of whether acts are within the scope of employment for purposes of vicarious liability, require an inquiry into whether they advance the interests of the employer in some way and are not done solely to benefit the employee. [18]

Defendant Trump moves to dismiss all remaining claims against him as he was not involved in the altercation and never exercised dominion or control over the seized banner. Similarly, Trump, Trump Campaign, and the Trump Organization move to dismiss because defendants Uher and Deck were not their employees or agents and therefore vicarious liability fails to apply. Specifically, they argue that defendants Uher and Deck were never employed by them, and were, instead of employees of XMark, a third-party, independent contractor.

In this analysis of the doctrine of respondeat superior, it must be noted the apparent association between defendants Trump, Trump Organization, and Trump Campaign, or synonymously the man, his company, and his campaign. Defendants motion to disassociate the actions of Schiller, Uher, and Deck from Trump, his namesake company, and campaign as a matter of law is unavailing. To the contrary, plaintiffs raise ample issues of fact that contrary to

[17] *Cornell v State of New York*, 46 NY2d 1032, 1033 (1979).
[18] N.X. v Cabrini Medical Center, 97 NY2d 247 (2002).

moving defendants' claims, tends to exhibit Trump's dominion and control over Schiller, Uher, and Deck.

Plaintiffs point out that Trump authorized and condoned the specific type of conduct of defendants Schiller, Uher, and Deck. [19] Furthermore, plaintiffs proffer evidence that indicates Trump's knowledge of the altercation and subsequent seizure of the banner. [20] The employment relationship between Uher and Deck and Trump Campaign is also a disputed issue of fact. [21] Finally, the plaintiffs presented evidence that illustrates the close relationship between Trump and Schiller, indicating Trump's behest guided Schiller's actions.[22] The fluidity of Schiller, Uher, and Deck's employment between Trump, Trump Campaign and Trump Organization present issues of facts that need to be addressed at trial.

V. Punitive Damages

The branch of Defendants' motion seeking summary judgment striking plaintiffs' requests for punitive damages is denied. The award of punitive damages under the circumstances

---

[19] Dictor Aff, Exhibit 28 (Trump speaking to reporters regarding protestors at a campaign rally: *"[T]he microphone — they just took the whole place over. And the audience, which liked him, I mean, they were him — they're saying, 'What's going on? How could this happen? That will never happen with me. I don't know if I'll do the fighting myself, or if other people will"*); Dictor Aff, Exhibit 27 (Trump speaking to reporters regarding protestors at a campaign rally: *"The man you say was roughed up, he was so obnoxious and so loud, he was screaming. I had 10,000 people in the room yesterday. 10,000 people. And this guy started screaming by himself. I don't know, rough up, he should have been – maybe he should have been roughed up because it was absolutely disgusting what he was doing"*); Dictor Aff, Exhibit 27 (Trump responding to protestors at a campaign rally: *"Throw him out into the cold! You know. Don't give them their coat. No coats. No coats! Confiscate their coats!"*).

[20] Dictor Aff, Exhibit 23 (In a December 9, 2015 interview with TIME Magazine regarding this specific protest, defendant Trump: *"They were trouble makers. With records, by the way, with records. The planters we have, they're very expensive plantings. It's called the Beautification of Fifth Avenue. We have these very expensive plants. And these guys are putting their cigarettes out on the thing, they're sitting in them. They're sitting there waiting, holding the signs, sitting on top of the plants. They were dressed as Ku Klux Klan. You know that? You know when they first came out they were dressed as Ku Klux Klan, okay. Would you think that if somebody was dressed as Ku Klux Klan—you know, they were dressed as Ku Klux Klan. And they were sitting in the planters, they were sitting on top of the plants. They did a lot of damage, we had to change the plants"*).

[21] Uher tr at 39 (Uher testifying that he did not believe he was ever paid by XMark); Deck tr at 27-32 (Deck testifying he was hired to preform security services for the Trump Organization).

[22] *See* Schiller tr 52-54 (Schiller unable to clearly identify his employer).

warranting the allowance of same rests in the discretion of the trier of facts. [23] It is for the trier of facts to determine whether defendants conduct justifies such an award, which must rise to the level of "spite or malice" or "evil motive." [24] Accordingly, it is

ORDERED that plaintiff Gonzalo Cruz Franco's claims are dismissed as he has withdrawn his claims in this action; and it is further

ORDERED that plaintiffs cause of action for negligent hiring, retention, and supervision are dismissed; and it is further

ORDERED that all other reliefs sought by defendants are denied.

This constitutes the decision of the court.

Dated: August 20, 2018

Bronx, NY

Hon. Fernando Tapia J.S.C.

[23] *Le Mistral, Inc. v Columbia Broadcasting System*, 61 AD2d 491, 495, app. dismd 46 NY2d 940.
[24] *Marinaccio v Town of Clarence*, 20 NY 3d 506 (2013).

PART 13

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

GALICIA, EFRAIN

-against-

TRUMP, DONALD J

----------X

Index №. **0024973/2015**

Hon. **FERNANDO TAPIA,**

Justice Supreme Court

[007]

The following papers numbered 1 to ____ Read on this motion, **SUMMARY JUDGEMENT DEFENDANT**
Noticed on **August 01 2017** and duly submitted as No. ____ on the Motion Calendar of ____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

SEE ANNEXED DECISION & ORDER

Motion is Respectfully Referred to:
Justice: ____
Dated: ____

Dated: 8/20/2018

Hon. _____
FERNANDO TAPIA, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13

EFRAIN GALICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, JOHNNY GARCIA & MIGUEL VILLAOBOS

Index: 24973-2015E

Plaintiffs,

Hon. Fernando Tapia, J.S.C.

- against -

DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER, GARY UHER, EDWARD JON DECK, JR., AND JOHN DOES 3-4,

Defendants.

DECISION

Plaintiffs bring this action against defendants alleging assault and battery, conversion and destruction of property, negligent hiring and supervision. Defendants Donald J. Trump (Trump), The Trump Organization, LLC (Trump Organization), and Keith Schiller move for an order under CPLR 3212 granting summary judgment in favor of the defendants. The remaining defendants, Donald J. Trump for President, Inc (Trump Campaign), Gary Uher, Edward Jon Deck, Jr in a similar motion move for the same relief. This decision will address both motions.

I. Assault and Battery

Defendants argue that plaintiff Perez assault and battery claim must fail as she was unsuccessful in coming forward with evidentiary proof sufficient to demonstrate who precisely committed an assault or battery against her. Perez testified at her deposition that a "short" and "dark-skin" security guard that came out of Trump tower and identified himself as working for defendant Trump touched her without consent. [1] Perez further testified that the security guard

[1] Perez tr at 35-39.

who touched her asked to her to remove her costume and "leave the place." [2] Defendant Deck testified that he approached a female protestor wearing a Ku Klux Klan costume and told her "you guys need to move because this is not - it's not a safe environment." [3] The issue of whether defendant Deck was, in fact, the same individual as alleged by Perez or possibly one of the John Doe defendants, plaintiff argues, would be a question of fact [4] for the jury to determine. In either instance, if it is found that Deck or defendant John Doe had, in fact, made contact with Perez, defendants Trump, Trump Organization, and Trump Campaign would be liable under the doctrine of respondeat superior. Under the doctrine of respondeat superior, an employer may be held vicariously responsible for a tort committed by his or her employee within the scope of employment. [5] Defendants have failed to meet their prima facie burden of entitlement to judgment on Perez's claim as a matter of law.

Defendants also seek to dismiss plaintiff Galicia assault and battery claim on the grounds that Schiller was acting in self-defense when he assaulted him. "The necessity of protecting one's self against attack is a defense against liability for assault and battery as a justification for acts which otherwise would constitute the tort." [6] The facts surrounding the altercation between Schiller and Galicia are disputed. Plaintiff asserts that the assault by defendant Schiller on Galicia took place when Schiller made physical contact with Galicia by tearing away a sign from Mr. Galicia's hand. [7] Defendants contrarily assert that Schiller had removed a sign that was impeding traffic and Galicia, in fact, was the one who initiated the contact. [8] After this initial

---

[2] *Id* at 38, lines 11-12.
[3] Deck tr at 96-97.
[4] *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 852 (1985) (On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case").
[5] *Jones v Hiro Cocktail Lounge*, 139 AD3d 608 (1st Dept. 2016).
[6] 6A NY Jur Assault -- Civil Aspects § 11.
[7] Galicia tr at 79-81.
[8] Schiller tr at 105-106, 124-125, 132-133.

contact by Galicia, defendants assert, Schiller acted in self-defense in repelling Galacia off his person. [9] Questions of facts abound; defendants have failed to eliminate material issues of facts from this case.

Furthermore, Galicia in action for a tortious battery can recover damages for pain and suffering. Those damages can be found in the testimony of the plaintiff alone. [10] Mr. Galicia went to Lincoln Hospital where he complained of pain and anxiety. [11] Plaintiff's subjective testimony of pain may be sufficient to establish an injury for which he or she is entitled to some compensation. Summary judgment on Galicia's assault and battery claims are denied.

II. Conversion & Destruction of Property

In this claim, it is alleged that defendants took possession of plaintiffs' banners without their consent by forcibly taking from them while they stood on the public sidewalk in front of Trump Tower. [12] "To establish a claim for conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or the exclusion of the plaintiff's rights." [13] Defendants assert that plaintiff has failed to establish the signs were altered or that the plaintiffs were deprived of their ability to use them.

To the contrary, plaintiffs posit that defendant Schiller tore one of the signs and then took possession of their banner for six weeks. [14] Plaintiffs by submitting evidence of damage to one of the signs by Schiller and the unlawful confiscation of the banner to the exclusion of the

---

[9] *Id.*
[10] *See McCombs v. Hegarty*, 205 Misc. 937, 130 N.Y.S.2d 547; *Levine v Abergel*, 127 AD2d 822 (2nd Dept 1987).
[11] Galicia tr at 97-106.
[12] Galicia tr at 72-81.
[13] *A & G Research, Inv. v. GC Metrics, Inc.*, 19 Misc.3d 1136[A (N.Y.Sup.Ct. 2008) *citing Independence Discount Corp. v. Bressner*, 47 A.D.2d 756 (2d Dept.1975).
[14] Galicia tr 81.

plaintiff's rights have met their prima facie burden. The assertion that plaintiffs must prove their intended use of the signs while the signs were in defendants' possession is without merit. Defendants fail to provide any legal precedent for this notion. Summary judgment on the conversion and destruction claim is denied.

III. Negligent Hiring, Retention & Supervision

The court next examines whether defendants Trump Organization or Mr. Trump met their burden for summary judgment on the claim that they cannot be found liable for defendants Schiller, Deck and Uher's intentional tort under the theory of negligent hiring, retention, and supervision. Defendants argue that this claim must be dismissed, citing *Karoon v New York City Transit Authority,* [15]

> **"Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention. This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training."**

Defendants argue since the acts were within the scope of Schiller, Deck and Uher employments, the plaintiffs cannot maintain a claim against their employers for negligent hiring or supervision. They additionally argue that plaintiffs' claim for negligent hiring, retention, and supervision fails as a matter of law since the record is devoid of any evidence that they knew or should have known [16] of Schiller, Deck and Uher's propensity for violence or assaultive

[15] 241 AD2d 323 (1st Dept 1997).
[16] *Sheila C. Povich*, 11 AD3d 120, 129-130 (1st Dept 2004) (employer knew or should have known of the employee's "propensity for the sort of conduct that caused the injury").

behavior. Plaintiffs in their opposition failed to present any theory as to how this alleged intentional tort was outside the scope of these employees' duties and furthermore provided no proof of any prior bad acts or disciplinary actions that would indicate a propensity for the alleged tortious conduct. Plaintiffs cause of action for negligent hiring, retention, and supervision is dismissed.

IV. Respondeat Superior

The doctrine of respondeat superior generally imposes liability for acts of an employee upon the employer if the employee was acting within the scope of his employment. [17] Determination of whether acts are within the scope of employment for purposes of vicarious liability, require an inquiry into whether they advance the interests of the employer in some way and are not done solely to benefit the employee. [18]

Defendant Trump moves to dismiss all remaining claims against him as he was not involved in the altercation and never exercised dominion or control over the seized banner. Similarly, Trump, Trump Campaign, and the Trump Organization move to dismiss because defendants Uher and Deck were not their employees or agents and therefore vicarious liability fails to apply. Specifically, they argue that defendants Uher and Deck were never employed by them, and were, instead of employees of XMark, a third-party, independent contractor.

In this analysis of the doctrine of respondeat superior, it must be noted the apparent association between defendants Trump, Trump Organization, and Trump Campaign, or synonymously the man, his company, and his campaign. Defendants motion to disassociate the actions of Schiller, Uher, and Deck from Trump, his namesake company, and campaign as a matter of law is unavailing. To the contrary, plaintiffs raise ample issues of fact that contrary to

[17] *Cornell v State of New York*, 46 NY2d 1032, 1033 (1979).
[18] N.X. v Cabrini Medical Center, 97 NY2d 247 (2002).

moving defendants' claims, tends to exhibit Trump's dominion and control over Schiller, Uher, and Deck.

Plaintiffs point out that Trump authorized and condoned the specific type of conduct of defendants Schiller, Uher, and Deck. [19] Furthermore, plaintiffs proffer evidence that indicates Trump's knowledge of the altercation and subsequent seizure of the banner. [20] The employment relationship between Uher and Deck and Trump Campaign is also a disputed issue of fact. [21] Finally, the plaintiffs presented evidence that illustrates the close relationship between Trump and Schiller, indicating Trump's behest guided Schiller's actions.[22] The fluidity of Schiller, Uher, and Deck's employment between Trump, Trump Campaign and Trump Organization present issues of facts that need to be addressed at trial.

V. Punitive Damages

The branch of Defendants' motion seeking summary judgment striking plaintiffs' requests for punitive damages is denied. The award of punitive damages under the circumstances

---

[19] Dictor Aff, Exhibit 28 (Trump speaking to reporters regarding protestors at a campaign rally: *"[T]he microphone — they just took the whole place over. And the audience, which liked him, I mean, they were him — they're saying, 'What's going on? How could this happen? That will never happen with me. I don't know if I'll do the fighting myself, or if other people will"*); Dictor Aff, Exhibit 27 (Trump speaking to reporters regarding protestors at a campaign rally: *"The man you say was roughed up, he was so obnoxious and so loud, he was screaming. I had 10,000 people in the room yesterday. 10,000 people. And this guy started screaming by himself. I don't know, rough up, he should have been – maybe he should have been roughed up because it was absolutely disgusting what he was doing"*); Dictor Aff, Exhibit 27 (Trump responding to protestors at a campaign rally: *"Throw him out into the cold! You know. Don't give them their coat. No coats. No coats! Confiscate their coats!"*).

[20] Dictor Aff, Exhibit 23 (In a December 9, 2015 interview with TIME Magazine regarding this specific protest, defendant Trump: *"They were trouble makers. With records, by the way, with records. The planters we have, they're very expensive plantings. It's called the Beautification of Fifth Avenue. We have these very expensive plants. And these guys are putting their cigarettes out on the thing, they're sitting in them. They're sitting there waiting, holding the signs, sitting on top of the plants. They were dressed as Ku Klux Klan. You know that? You know when they first came out they were dressed as Ku Klux Klan, okay. Would you think that if somebody was dressed as Ku Klux Klan—you know, they were dressed as Ku Klux Klan. And they were sitting in the planters, they were sitting on top of the plants. They did a lot of damage, we had to change the plants"*).

[21] Uher tr at 39 (Uher testifying that he did not believe he was ever paid by XMark); Deck tr at 27-32 (Deck testifying he was hired to preform security services for the Trump Organization).

[22] *See* Schiller tr 52-54 (Schiller unable to clearly identify his employer).

warranting the allowance of same rests in the discretion of the trier of facts. [23] It is for the trier of facts to determine whether defendants conduct justifies such an award, which must rise to the level of "spite or malice" or "evil motive." [24] Accordingly, it is

ORDERED that plaintiff Gonzalo Cruz Franco's claims are dismissed as he has withdrawn his claims in this action; and it is further

ORDERED that plaintiffs cause of action for negligent hiring, retention, and supervision are dismissed; and it is further

ORDERED that all other reliefs sought by defendants are denied.

This constitutes the decision of the court.

Dated: August 20, 2018

Bronx, NY

Hon. Fernando Tapia J.S.C.

[23] *Le Mistral, Inc. v Columbia Broadcasting System*, 61 AD2d 491, 495, app. dismd 46 NY2d 940.
[24] *Marinaccio v Town of Clarence*, 20 NY 3d 506 (2013).

EXHIBIT 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

EFRAIN GALICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, JOHNNY GARCIA and MIGUEL VILLALOBOS, Plaintiffs, -against- DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER and JOHN DOES 1-4, Defendants.	SUBPOENA AD TESTIFICANDUM Index No. 24973/2015E Hon. Fernando Tapia, J.S.C. Part IA-13

To: Donald J. Trump
c/o Matthew R. Maron, Assistant General Counsel – Litigation
Trump Organization LLC
725 Fifth Avenue
New York, New York 10022

GREETINGS:

YOU ARE HEREBY COMMANDED to appear before Hon. Fernando Tapia, J.S.C., a justice of this court at Civil Term, Part IA-13, held at the Supreme Court, Bronx County Courthouse, 851 Grand Concourse, Bronx, New York 10451, at a date and time of trial to be determined by the Court, and at any recessed or adjourned date of the trial, to testify and give evidence as a witness on behalf of the plaintiff in the above-entitled action; and for a failure to attend you will be deemed guilty of a contempt of court and liable for all damages sustained to the party aggrieved thereby and to forfeit $50 in addition thereto.

Dated: Rhinebeck, New York
December 28, 2018

Respectfully submitted:

Nathaniel K. Charny
Charny & Wheeler
9 West Market Street
Rhinebeck, New York 12572
Tel - (845) 876-7500
ncharny@charnywheeler.com

Attorneys for Plaintiffs

CHARNY & WHEELER
ATTORNEYS AT LAW
9 WEST MARKET STREET
RHINEBECK, NEW YORK 12572
(845) 876-7500

RHINEBECK BANK
6414 MONTGOMERY STREET
RHINEBECK, NEW YORK 12572
50-7101/2219

2756

December 28, 2018

PAY TO THE ORDER OF Donald J. Trump $ 21.90

Twenty-one and 90/100 DOLLARS

MEMO: witness fee

HEAT SENSITIVE RUB AREA TO VERIFY

AUTHORIZED SIGNATURE

⑈002756⑈ ⑆221971015⑆ 710002371 7⑈

CHARNY & WHEELER ATTORNEYS AT LAW 2756

CHARNY & WHEELER ATTORNEYS AT LAW 2756

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

EFRAIN GALICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, JOHNNY GARCIA and MIGUEL VILLALOBOS,

Plaintiffs,

-against-

DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER and JOHN DOES 1-4,

Defendants.

AFFIRMATION OF SERVICE

Index No. 24973/15E

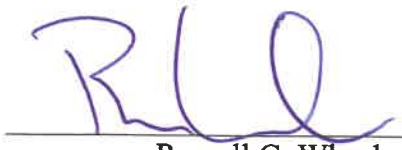
Russell G. Wheeler affirms and states:

I am an attorney licensed to practice law in New York, not a party to the action, am over 18 years of age and reside in Dutchess County, New York. On the 28th day of December, 2018, I served a true copy of: Notice to Admit, Subpoena Ad Testificandum to Keith Schiller and Subpoena Ad Testificandum to Donald Trump by U.S. Express Mail Overnight Delivery, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, to the defendant addressed as indicated below:

Matthew R. Maron
Assistant General Counsel – Litigation
Trump Organization LLC
725 Fifth Avenue
New York, New York 10022

Lawrence S. Rosen
LaRocca, Hornik, Rosen, Greenberg & Blaha
The Trump Building
40 Wall Street, 32nd Floor
New York, New York 10005

Dated: Rhinebeck, New York
January 7, 2019



Russell G. Wheeler

EXHIBIT 3

LAROCCA HORNIK ROSEN GREENBERG & BLAHA LLP
COUNSELORS AT LAW

THE TRUMP BUILDING
40 WALL STREET
32ND FLOOR
NEW YORK, NY 10005
212-530-4823
212-530-4815 FAX
LHRGB.COM

FREEHOLD COMMONS
83 SOUTH STREET
3RD FLOOR
FREEHOLD, NJ 07728
732-409-1144
732-409-0350 FAX

FRANK J. LAROCCA ±o
JONATHAN L. HORNIK
LAWRENCE S. ROSEN
ROSE GREENBERG ▵
ERIC PETER BLAHA
AMY D. CARLIN ▵
PATRICK T. MCPARTLAND ▵
DAVID N. KITTREDGE ▵
FLORENCE R. GOFFMAN ▵o
JARED E. BLUMETTI
SHERRY HAMILTON
SEAN EDWARDS ▵

▵ NEW YORK BAR ONLY
± NEW JERSEY BAR ONLY
o OF COUNSEL ATTORNEYS
o CERTIFIED MATRIMONIAL LAW ATTORNEY
* PRACTICING AS AN LLC

DIRECT DIAL: 212.530.4822
EMAIL: LROSEN@LHRGB.COM

January 11, 2019

VIA EMAIL: ncharny@charnywheeler.com
& REGULAR MAIL
Nathaniel K Charny, Esq.
Charny & Wheeler
9 West Market Street
Rhinebeck, New York 12572

Re: Galicia, et al. v. Trump, et al.
Supreme, Bronx County Index No.: 24973/15E

Dear Mr. Charny:

We hereby reject the Plaintiffs' trial subpoena (and check) directed to our client Donald J. Trump (copy enclosed).

As an initial matter, you are likely aware that the Appellate Division, First Department, is currently considering whether federalism and comity preclude a sitting President from being sued in state court for unofficial acts. *See Zervos v. Trump*, 74 N.Y.S.3d 442 (Sup. Ct. N.Y. Cty., 2018). In the event that the Appellate Division rules in favor of President Trump in *Zervos*, then your clients' claims against President Trump in the instant action would either be dismissed or severed. Oral argument in *Zervos* occurred on October 18, 2018, and a decision is expected in the coming weeks.

In any event, even if the Appellate Division does not rule in favor of President Trump, the Plaintiffs here have waived trial testimony from the President (via deposition transcript or otherwise) because they have forgone the required procedure for compelling testimony from a sitting President, as mandated in *Clinton v. Jones*, 520 U.S. 681 (1997). In *Clinton*, the US Supreme Court allowed claims to proceed against a sitting President based on the assumption that the President would never have to actually appear in person at the trial, and that the plaintiff would instead arrange a pre-trial deposition at the White House, the transcript of which could then be used at trial in lieu of the President's personal appearance. *Id.*, 520 U.S. at 691–92.[1]

[1] "We assume that the testimony of the President, ***both for discovery and for use at trial***, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, ***there would be no necessity for the President to attend in person…***" (unless the President voluntarily agreed to appear) 520 U.S. at 691–92 (emphasis added).

Significantly, in its order of June 1, 2016 in this case, the court denied Plaintiffs' cross motion to compel Mr. Trump's deposition, noting that "Plaintiffs have not demonstrated a sufficient basis for this Court to compel the examination before trial of a company's Chairman under such circumstances...." On February 14, 2017, following this order and after no less than ten pre-trial depositions, the Plaintiffs elected to serve and file their note of issue, *certifying* that all discovery was complete, without re-noticing the deposition of President Trump or seeking to renew their motion to compel his deposition.

Having declined to pursue a pre-trial deposition of President Trump, to be held at the White House at a time and date accommodating the President's schedule pursuant to the dictates of the Supreme Court in *Clinton v. Jones*, the Plaintiffs are precluded from now commanding his testimony at trial via subpoena at some future date in Bronx County. The subpoena that you served is null and void, and hereby rejected.[2]

Very truly yours,

Lawrence S. Rosen

Enclosure:

cc: Benjamin N. Dictor, Esq. (*via email & regular mail w/ enclosure*)
Eisner & Associates, P.C.
39 Broadway, Suite 1540
New York, NY 10006
E: ben@eisnerdictor.com

Mathew R. Maron, Esq. (*via email & regular mail w/ enclosure*)
Trump Organization, LLC
725 Fifth Avenue
New York, NY 10022
E: mmaron@trumporg.com

Jeffrey L. Goldman, Esq. (*via email & regular mail w/ enclosure*)
Belkin Burden Wenig & Goldman, LLP
270 Madison Avenue
New York, NY 10016
E: jgoldman@bbwg.com

[2] Based on the information contained in your cover letter, dated December 28, 2018, it appears that the original subpoena and check (for witness fee) was mailed via first class mail to Matthew Maron at his Trump Tower, 725 Fifth Avenue address. As such, it is likely that it was routed through the United States Secret Service in Washington for security purposes, which would delay actual delivery to Mr. Maron's office by weeks, if not months (even absent a partial government shutdown). To date, Mr. Maron has not received the original subpoena or check.

Charny & Wheeler

Attorneys at Law

Nathaniel K. Charny (NY & NJ Bar)
Russell G. Wheeler
Benjamin N. Dictor

9 West Market Street
Rhinebeck, New York 12572
Tel: 845-876-7500
Fax: 845-876-7501

December 28, 2018

By U.S. Express Mail Overnight Delivery
Matthew R. Maron
Assistant General Counsel – Litigation
Trump Organization LLC
725 Fifth Avenue
New York, New York 10022

Re: Galicia v. Trump
Index No. 24973/2015E

Dear Mr. Maron:

This office represents Plaintiffs in the above-referenced matter.

Enclosed for service are trial subpoenas directed to your clients Donald J. Trump and Keith Schiller, Jr., as well as checks payable in the amount of the applicable witness fees.

Sincerely,

Nathaniel K. Charny

Enclosures

cc: Lawrence S. Rosen, Esq.

CHARNY & WHEELER
ATTORNEYS AT LAW
9 WEST MARKET STREET
RHINEBECK, NEW YORK 12572
(845) 876-7500

RHINEBECK BANK
6414 MONTGOMERY STREET
RHINEBECK, NEW YORK 12572
50-7101/2219

2756

December 28 2018

PAY TO THE ORDER OF Donald J. Trump

$ 21.90

Twenty-one and 90/100

DOLLARS

MEMO: witness fee

AUTHORIZED SIGNATURE

HEAT SENSITIVE
AREA TO VERIFY

"002756" ⑆221971015⑆ 710002371?"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

EFRAIN GALICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, JOHNNY GARCIA and MIGUEL VILLALOBOS, Plaintiffs, -against- DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER and JOHN DOES 1-4, Defendants.	SUBPOENA AD TESTIFICANDUM Index No. 24973/2015E Hon. Fernando Tapia, J.S.C. Part IA-13

To: Donald J. Trump
c/o Matthew R. Maron, Assistant General Counsel – Litigation
Trump Organization LLC
725 Fifth Avenue
New York, New York 10022

GREETINGS:

YOU ARE HEREBY COMMANDED to appear before Hon. Fernando Tapia, J.S.C., a justice of this court at Civil Term, Part IA-13, held at the Supreme Court, Bronx County Courthouse, 851 Grand Concourse, Bronx, New York 10451, at a date and time of trial to be determined by the Court, and at any recessed or adjourned date of the trial, to testify and give evidence as a witness on behalf of the plaintiff in the above-entitled action; and for a failure to attend you will be deemed guilty of a contempt of court and liable for all damages sustained to the party aggrieved thereby and to forfeit $50 in addition thereto.

Dated: Rhinebeck, New York
December 28, 2018

Respectfully submitted:

Nathaniel K. Charny
Charny & Wheeler
9 West Market Street
Rhinebeck, New York 12572
Tel - (845) 876-7500
ncharny@charnywheeler.com

Attorneys for Plaintiffs

Charny & Wheeler
9 West Market Street
Rhinebeck, New York 12572

Lawrence S. Rosen, Esq.
LaRocca Hornik Rosen Greenberg & Blaha LLP
40 Wall Street, 32nd Floor
New York, New York 10005

10005-147532

EXHIBIT 4

50 Misc.3d 1220(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
Civil Court, City of New York,
New York County.

TURIN HOUSING DEVELOPMENT FUND COMPANY, INC., Petitioner/Landlord,

v.

Alfredo SUAREZ, et al., Respondents/Tenants.

No. 82366/2012.
|
Feb. 18, 2016.

Opinion

JACK STOLLER, J.

***1** Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion.

Papers Numbered

Notice of Motion (Seq.No.5) and Supplemental Affidavit and Affirmation Annexed.... 1, 2, 3

Affirmation In Opposition (Seq.# 5) 4

Order to Show Cause (Seq.# 6) and Supplemental Affirmation Annexed 5, 6

Affirmation In Opposition (Seq.# 6) of Petitioner 7

Affirmation In Opposition (Seq.# 6) of Petitioner's counsel 8

Reply Affirmation (Seq.# 6) 9

Notice of Cross–Motion (Seq.# 7) and Supplemental Affirmation Annexed 10, 11

Notice of Motion (Seq.# 8) and Supplemental Affirmation and Affidavit Annexed 12, 13, 14

Affidavit in Opposition (Seq.# 8) 15

Order To Show Cause (Seq.# 9) and Supplemental Affirmation Annexed 16, 17

Notice of Motion (Seq.# 10) and Supplemental Affirmation Annexed 18

Notice of Motion (Seq.# 11) and Supplemental Affirmation Annexed 19, 20

Affirmation In Opposition (Seq.# 11) of Petitioner 21

Affirmation In Opposition (Seq.# 11) of Petitioner's counsel 22

Notice of Motion (Seq.# 12) and Supplemental Affirmation Annexed 23, 24

Notice of Motion (Seq.# 13) and Supplemental Affirmation and Affidavit Annexed 25, 26, 27

Affirmation In Support (Seq.# 13) of Petitioner's former agent 28

Affirmation In Support (Seq.# 13) of Petitioner's counsel 29

Notice of Cross–Motion (Seq.# 14) and Supplemental Affirmation Annexed 30

Affirmation In Opposition (Seq.# 14) of Petitioner 31

Reply Affirmation (Seq.# 14) to Petitioner's Opposition 32

Affirmation In Opposition (Seq.# 14) of Petitioner's counsel 33

Reply Affirmation (Seq.# 14) to Petitioner's counsel's Opposition 34

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

Turin Housing Development Fund Company, the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against Alfred Sanchez ("Respondent's late husband"), seeking a money judgment and possession of 609 Columbus Avenue, Apt. 6L, New York, New York ("the subject premises") on the basis of nonpayment of maintenance. Petitioner obtained a judgment based upon a failure to answer. A warrant of eviction issued and was executed. Cruz Sanchez ("Respondent") moved to be restored to possession. The parties entered into a stipulation dated July 9, 2013 ("the Stipulation") vacating the judgment and warrant and restoring Respondent to possession. The

Court then entered into an order dated August 1, 2013 ("the Order") finding that Petitioner's conduct in this proceeding warranted a hearing to determine if sanctions should be imposed and, if so, how much. The proceeding was then marked off calendar. Now various movants move for various kinds of relief. The Court consolidates these motions for resolution herein. [1]

As noted above, the Stipulation vacated the judgment and warrant, restored Respondent to possession of the subject premises, and adjourned so much of the motion as sought a judgment sounding in attorneys' fees to July 31, 2013. The Court reserved decision that day and entered into the Order on the following day.

***2** The Order found that the subject premises is located in a residential cooperative building subject to a subsidy pursuant to 12 U.S.C. § 1715z–1, known colloquially as "Section 236"; that Respondent's late husband was a proprietary lessee of the subject premises; and that Respondent's late husband died in September of 2007. The record shows that the rent demand pursuant to RPAPL § 711(2) and the notice of petition and petition, dated more than four years after Respondent's late husband died, only named Respondent's late husband and no other party. The record also shows that Petitioner only purported to serve Respondent's late husband and no other party with the rent demand and the petition, again years after Respondent's late husband died. The Order found that the then-managing agent for Petitioner ("the managing agent") entered into an affidavit pursuant to 50 U.S.C. § 3931 swearing that she had spoken with Respondent's late husband to investigate whether he was in the military on a date after he had, in fact, died; that the managing agent admitted that she executed the affidavit without reading it and that that was her standard practice; that the managing agent swore in another affidavit in support of a default judgment that she did not know of any reason why Respondent's late husband would not be able to answer the petition even though Petitioner's records indicated that, had Respondent's late husband been alive at that time, he would have been ninety years old; and that Petitioner had written knowledge of Respondent's tenancy at the subject premises—which extended back to 1979, thirty-three years before the commencement of this proceeding—and still proceeded to evict her without ever naming or serving her. The Order found that Petitioner's eviction of Respondent "is clearly an action without any merit in law."

The Order further found that Petitioner was made aware of Respondent's unlawful eviction claim in May of 2013, but that Petitioner did not restore Respondent to possession of the subject premises until two months later, after she had retained counsel.

The Court noted that Petitioner's counsel signed the petition pursuant to 22 N.Y.C.R.R. § 130–1.1. The Court granted Respondent's motion for sanctions "to the extent of setting the matter down for a hearing to provide Petitioner, its agents and counsel with a reasonable opportunity to be heard prior to a final determination on whether Petitioner and its attorneys engaged in frivolous conduct ..., whether cost and/or sanctions ... should be imposed on Petitioner and/or [Petitioner's] attorney[ ], and if so the appropriate amount of said costs and/or sanctions." The Court made this determination, it noted, despite Petitioner's assertion in opposition to Respondent's motion that Respondent committed some type of fraud by not living in the subject premises and evading HUD requirements for annual re-certification. The file shows that Respondent served Petitioner with a copy of the order with notice of entry pursuant to CPLR § 5513(a) on August 6, 2013.

***3** No party objects to a restoration of this matter to the Court's calendar. Respondent sued Petitioner in a plenary action in Supreme Court, and there had been some question as to removal of this proceeding as such, but the Court resolved this question in the negative. The Court therefore grants Respondent's motion to restore this proceeding to the Court's calendar herein. [2]

The motions of Petitioner and Petitioner's counsel [3] to vacate the Stipulation and the Order raise a threshold issue. Accordingly, the Court addresses the motions to vacate the Stipulation and Order before reaching the other motions.

Petitioner and Petitioner's counsel argue that Respondent has not been residing in the subject premises as her primary residence, thus perpetuating a fraud upon Petitioner and the Court and warranting vacatur of the judgment and warrant. As evidence of Respondent's failure to primarily reside in the subject premises, Petitioner and Petitioner's counsel show unrebutted documentation of another summary proceeding that another owner of subsidized housing ("the other

landlord") commenced against Respondent in a different part of the New York County Housing Court. An order of that Court part found that Respondent lives at this other address ("the other apartment"). Petitioner and Petitioner's counsel argue that Respondent's failure to maintain the subject premises as her primary residence renders ineffective her claim that she was harmed by an illegal eviction, and furthermore that Respondent should not have been restored to the subject premises in the first instance. *See* 24 C.F.R. § 236.710(a) (if an occupant of Section 236 housing is a shareholder in a cooperative, the benefits therein are only available to cooperative members who occupy the dwelling units) .[4]

Even though the Order was not obtained on default, the Court may consider a motion to vacate a judgment based upon newly-discovered evidence and fraud, both of which Petitioner and Petitioner's counsel allege here. *See, e.g., Prote Contr. Co. v. Board of Educ.,* 230 AD3d 32 (1st Dept.1997). Be that as it may, even assuming *arguendo* that Respondent made a misrepresentation to Petitioner and to the Court, not every misrepresentation or omission rises to the level of fraud. *Gaidon v. Guardian Life Ins. Co. of Am.,* 94 N.Y.2d 330, 350 (1999). *Compare Held v. Kaufman,* 91 N.Y.2d 425, 431 (1998) (a misrepresentation must be material in order for a party to have a cause of action sounding in fraud), *Small v. Lorillard Tobacco Co.,* 94 N.Y.2d 43, 57 (1999) (an act of deception, entirely independent or separate from any injury, is not sufficient to state a cause of action under a theory of fraudulent concealment). Assuming *arguendo* that Respondent maintains her primary residence somewhere other than the subject premises, and further assuming *arguendo* that Respondent misrepresented her primary residence in the prior motion practice, Petitioner and Petitioner's counsel lose sight of the fact that this is a proceeding sounding in nonpayment of maintenance. Neither Petitioner not Petitioner's counsel allege that Respondent owed arrears in maintenance at the time she was evicted. To the extent that a vacatur of the Order and the Stipulation would reinstate the judgment and warrant against Respondent, it would do so with complete disregard of the merits of this proceeding.

***4** Nor do Petitioner or Petitioner's counsel raise any issue that Respondent's late husband died long before commencement of this proceeding in his name. Even if, assuming *arguendo* that Respondent was not living at the subject premises, and even if, assuming *arguendo* that whomever was responsible for paying maintenance for the subject premises owed arrears, RPAPL § 711(2) contains specific requirements for maintaining a nonpayment summary proceeding against a deceased tenant, which Petitioner did not comply with, notably joinder of a survivor of Respondent's late husband. Again, to the extent that Petitioner and Petitioner's counsel seek to reinstate the judgment and warrant in this nonpayment proceeding via a vacatur of the Order and the Stipulation, they fail to show that any purported misrepresentation or fraud had any bearing on Petitioner's ostensible cause of action against Respondent's late husband for nonpayment of maintenance. Accordingly, assuming *arguendo* that Respondent engaged in fraud or misrepresentation about her primary residence, such misrepresentation was not material to a nonpayment proceeding.

Given that the Order determined that Petitioner and Petitioner's counsel could be subject to sanctions, it seems that the true gravamen of their motions is to vacate that part of the Order exposing them to sanctions. Petitioner and Petitioner's counsel argue that Respondent could not have suffered the damages she alleges if she was not actually rendered homeless by the execution of a warrant of eviction procured, in part, by an undeniably false affidavit of the managing agent. Petitioner's and Petitioner's counsel's argument could theoretically bear some relevance to, say, a cause of action of Respondent sounding in damages pursuant to RPAPL § 853. But the Order and the hearing the Order contemplates do not sound in such damages. Rather, the Order finds that a hearing is appropriate to determine sanctions against Petitioner and Petitioner's counsel.

A purpose of sanctions is to advance the public interest, *Tag 380, LLC v. Estate of Howard P. Ronson,* 69 AD3d 471, 475 (1st Dept .2010), in part to prevent malicious litigation tactics. *Levy v. Carol Mgmt. Corp.,* 260 A.D.2d 27, 34 (1st Dept.1999), *Kernisan v. Taylor,* 171 A.D.2d 869, 870 (2nd Dept.1991). Neither Petitioner nor Petitioner's counsel dispute that the managing agent committed an act of fraud on the Court by executing a false non-military affidavit nor that Petitioner should have commenced a summary eviction proceeding only against a party who had been dead for four years. Even assuming *arguendo* that the person evicted as a result of such actions was a fraudfeasor of the first order, the Court has an independent interest in discouraging such violations of law and Court procedures as Petitioner has engaged in.

Petitioner argues that it terminated the employment of the managing agent who executed a false affidavit in support of the warrant of eviction, and that such termination satisfies the Court's policy concerns. However, not only is the point of the hearing the Court has already ordered to determine whether this is the case as a factual matter, but the Court's finding that the managing agent's execution of such affidavits without reading them was a standard procedure raises a question about how isolated her own actions, in fact, were.

***5** Moreover, a failure of a tenant to occupy an apartment as a primary residence is a ground for eviction in many types of regulated housing. Landlords commencing such holdover proceedings predicated upon this ground must often satisfy specific requirements concerning predicate notices and pleading. *See, e.g.,* 9 N.Y.C.R .R. § 2524.2(c)(2). If the nonprimary residence of a tenant constituted an excuse to evict him or her without naming or serving him or her in a nonpayment proceeding, which is essentially what Petitioner and Petitioner's counsel argue, landlords would have a ready-made avenue to avoid predicate notice requirements to evict such tenants. No discernible authority supports such a course of action. Accordingly, the Court denies the motions of both Petitioner and Petitioner's counsel's motions to vacate the Stipulation and the Order, without prejudice to Petitioner's and Petitioner's counsel's positions regarding Respondent's primary residence in the context of other litigation between these parties. [5]

Similar reasoning informs the Court regarding the subpoenas *duces tecum* Respondent seeks to quash, served both on Respondent, the other landlord, and Respondent's nephew, among other people. Petitioner is explicit in the subpoenas it serves that the purpose of the subpoenas is to ascertain Respondent's primary residence. Respondent's residence, primary or not, at the subject premises or not, is emphatically no excuse to commit perjury in a non-military affidavit, and is similarly no excuse for the commencement of a summary proceeding without naming or serving a party known to a petitioner as a proprietary lessee and a member of the household.

An application to quash a subpoena *duces tecum* should be granted where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry. *Anheuser–Busch, Inc. v. Abrams,* 71 N.Y.2d 327, 331–332 (1988), *People v. Marcus Garvey Nursing Home, Inc.,* 57 AD3d 201, 202 (1st Dept.2008), *Ayubo v. Eastman Kodak Co.,* 158 A.D.2d 641, 642 (2nd Dept.1990). While this is a high hurdle to clear, Respondent clears it in this case. Respondent's residency at the subject premises has no tendency—utterly no tendency—to make it more or less likely that Petitioner should countenance the execution of false non-military affidavits. Nor does the primary residence of Respondent have any tendency to make it more or less likely that Petitioner should have commenced an eviction proceeding against her without naming or serving her. Damages that Respondent may or may not have suffered are not the issue. The Court has a separate interest in penalizing the conduct Petitioner engaged in independent of the conduct of Respondent.

Be that as it may, Petitioner's entire motion to vacate the judgment pursuant to CPLR § 5015 is predicated upon the proposition that Petitioner did not know the extent of Respondent's nonprimary residence at the subject premises until after the Order. The Order otherwise held, and so it is law of the case, that Petitioner knew of Respondent's proprietary tenancy at the subject premises and her presence on the household composition of the subject premises. Assuming *arguendo* that Petitioner turned out to have been mistaken about Respondent's primary residency, Petitioner cannot travel back in time and retroactively justify a failure to name and serve her. Accordingly, as the subpoenas *duces tecum* Petitioner served on Respondent, the other landlord, and other parties seek production at the hearing of documentation of Respondent's primary residence, the Court grants Respondent's motion to quash all of the subpoenas *duces tecum.*

***6** Petitioner also subpoenaed Respondent's counsel, seeking documentation that Respondent's counsel actually represents Respondent. In general, an attorney is presumed to have authority to represent his or her client. *Carpenter v. New York Trust Co.,* 174 A.D. 378, 383 (1st Dept.1916), *aff'd sub nom., Rock Island Butter Co. v. Rowland,* 221 N.Y. 720 (1917), *In re Estate of Bogom,* 181 A.D.2d 989 (4th Dept.1992), *Will of Locke,* 21 A.D.2d 248, 252 (3rd Dept.), *leave to appeal denied sub nom. In re Locke,* 15 N.Y.2d 482 (1964), *Silvaria v. Intrepid Museum Found.,* 2003 N.Y. Misc. LEXIS 2031 (S.Ct. N.Y. Co.2003). Accordingly, as loath as the Court is to encourage yet more motion practice on this matter, the proper means by which to challenge the authority of

a party's attorney is by motion practice prior to the trial (or hearing), *Weinstock v. Long,* 29 Misc.2d 795 (S.Ct. Westchester Co.1961), *citing O.G. Orr. & Co. v. Fireman's Fund Ins. Co.,* 141 Misc. 330, 333 (S.Ct. Greene Co.1931), *rev'd on other grounds,* 235 A.D. 1 (3rd Dept.1932), not to spring it on a party at a hearing itself. Accordingly, the Court grants Respondent's motion to quash the subpoena *duces tecum* on Respondent's counsel.

However, the right to issue a subpoena *ad testificandum* is absolute. *Evercore Partners Inc. v. Lazard Freres & Co., LLC,* 2011 N.Y. Misc. LEXIS 5243, 3–4 (S.Ct. N.Y. Co.2011), *citing Hirshfield v. Craig,* 239 N.Y. 98, 117 (1924). *See Also Beach v. Shanley,* 62 N.Y.2d 241, 248 (1984), *New York State Com. on Government Integrity v. Congel,* 156 A.D.2d 274, 280 (1st Dept.1989) (even an assertion of a privilege is not sufficient to quash a subpoena in advance of the witness' testimony). Accordingly, the Court denies so much of Respondent's motion as seeks to quash all of the subpoenas *ad testificandum* that Petitioner served, without prejudice to any evidentiary objections Respondent may have to any testimony any party adverse to Respondent seeks from any subpoenaed witness, and without prejudice to any offers of proof Respondent may request of the Court and other evidentiary rulings the hearing Court may render in its sound discretion. [6]

Respondent moves for sanctions against Petitioner and Petitioner's counsel for service of the subpoenas *duces tecum* and for their CPLR § 5015 motion to vacate the judgment. Respondent does not dispute that she has been essentially harboring tenancies in two federally-subsidized apartments at the same time. Even though Respondent's conduct as such is not before the Court, and the Court does not now make any findings preclusive on the rights of any parties in future litigation, for the limited purposes of Respondent's instant sanctions motion, Respondent's occupancy of two federally-subsidized apartments deprives subsidized housing to people who need it and who may be waiting for it and exacerbates the very shortage of affordable housing that subsidized housing was designed to ameliorate in the first place. In light of such inequitable conduct by Respondent, the Court does not find that Petitioner's and Petitioner's counsel's motion to vacate the Stipulation and the Order, nor their service of the subpoenas the Court has quashed, were so out of line as to warrant a finding of frivolity sufficient to justify sanctions. *Compare Pawar v. The Stumble Inn,* 2012 N.Y. Misc. LEXIS 5056 (S.Ct. N.Y. Co.2012). Accordingly, the Court denies Respondent's motion for sanctions (aside from the sanctions already the subject of a hearing to be held pursuant to the Order). [7]

***7** Respondent also moves to hold Petitioner in contempt for service of a subpoena during the pendency of a stay against the subpoena. The order that Respondent accuses Petitioner of disobeying, in effect during the pendency of a prior motion to quash, stated, “let the subpoena be stayed pending the hearing and determination of the motion.” After that, the motion was not determined, as the parties engaged in motion practice before Supreme Court over the issue of whether this proceeding would be removed and joined with that action.

Given the history of the motion practice, the Court finds that a reasonable interpretation of the injunction “let the subpoena be stayed pending the hearing” operates to relieve the party subpoenaed from an obligation to comply with the subpoena. This interpretation would not render contemptuous service of another subpoena as Petitioner has done herein. As contempt is a drastic remedy which the Court shall not grant without a clear right to the relief, *Benson Park Assoc. LLC v. Herman,* 93 AD3d 609 (1st Dept.2012), Respondent must prove that Petitioner disobeyed an unequivocal mandate of the Court in order to prove contemptuous conduct. *McCain v. Dinkins,* 84 N.Y.2d 216, 226 (1994). Pursuant to this law, Petitioner's subpoenas would only be contemptuous if they violated an unequivocal mandate of the Court prohibiting Petitioner from issuing additional subpoenas. As the extant order of the Court is not so “unequivocal,” the Court denies Respondent's motion to hold Petitioner in contempt. [8]

Prior to this matter being stayed for the parties to litigate the issue of whether Supreme Court should remove this proceeding, Petitioner moved to quash subpoenas served by Petitioner's counsel and Respondent. Now that the proceeding is being restored to this Court for a hearing, the Court addresses this motion.

Petitioner's counsel subpoenaed board members of Petitioner [9] seeking production at trial of “[a]ny and all correspondence” mentioning “in any way” Respondent, Respondent's late husband, or a number of other individuals connected with the subject premises and “[a]ny

and all correspondence" concerning litigation relating to the subject premises.

The purpose of a subpoena *duces tecum* is to compel the production of specific documents at a hearing. *Matter of Terry D.,* 81 N.Y.2d 1042, 1044 (1993). Accordingly, overbreadth is a ground upon which to quash a subpoena. *Bour v. 259 Bleecker LLC,* 104 AD3d 454, 455 (1st Dept.2013). A subpoena that seeks "any and all" communications about the subject premises is only of use at a hearing if Petitioner produces such documents and then Petitioner's counsel pages through them, looking for something useful, the very picture of a fishing expedition, a ground upon which a subpoena *duces tecum* is subject to quashing. *Mestel & Co. v. Smythe Masterson & Judd,* 215 A.D.2d 329, 329–330 (1st Dept.1995). The Court therefore grants Petitioner's motion to quash all of the subpoenas *duces tecum* that Petitioner's counsel served on every member of Petitioner's board, except for the subpoena served on Luis Rosario, an employee of Petitioner. As noted above, as the right to issue a subpoena *ad testificandum* is absolute, *Beach, supra,* 62 N.Y.2d at 248, the Court denies so much of Petitioner's motion as seeks to quash all of the subpoenas *ad testificandum* that Petitioner served, without prejudice to any evidentiary objections Petitioner may have to any testimony any party adverse to Petitioner seeks from any subpoenaed witness.

***8** The subpoena that Petitioner served on Luis Rosario, while also impermissibly seeking "any and all" communications, is specific about seeking records of repair requests and maintenance records for the subject premises from January 1, 2000 to the present. A subpoena that seeks "all" records, but qualifies that request with specifics is permissible. *In re Nassau County Grand Jury (Doe Law Firm),* 4 NY3d 665, 670 (2005), *Soho Generation v. Tri–City Ins. Brokers,* 236 A.D.2d 276, 277 (1st Dept.1997). The Court does not find Petitioner's argument that Petitioner's counsel may not serve a subpoena in its own right to be unpersuasive and difficult to reconcile with basic notions of due process. The Court directed a hearing for sanctions against Petitioner's counsel in addition to and as distinct from Petitioner, so Petitioner's counsel has a direct interest in the outcome of the hearing in its own right, distinct from that of Petitioner. Accordingly, the Court denies Petitioner's motion to quash the subpoena *duces tecum* on Luis Rosario.

Respondent subpoenaed Petitioner's former counsel seeking essentially confirmation of communications between Respondent and Petitioner's former counsel. As the subpoena specifically disavowed an interest in privileged communications, and as the communications bear potential relevance to a sanctions hearing—i.e., the notice that Petitioner and/or Petitioner's counsel may have had during the course of engaging in conduct that the Court found to be without merit—Petitioner does not state grounds upon which to quash a subpoena. Moreover, while Respondent's subpoena does include one paragraph seeking "any and all" records, Respondent's subpoena seeks highly specific production of item like stock ownership, maintenance billing, checks or money orders received, correspondence from Respondent or Respondent's nephew, certifications, and minutes of the board of Petitioner authorizing a summary proceeding. The inclusion of such specifics warrants denial of the motion to quash, even for a subpoena that otherwise seeks production of "all" documents. *In re Nassau County Grand Jury (Doe Law Firm), supra,* 4 NY3d at 670, *Soho Generation, supra,* 236 A.D.2d at 277. [10]

Respondent also moved to hold Petitioner in contempt of Court for failure to comply with a subpoena *duces tecum.* Respondent bases its motion on an observation of a person affiliated with Petitioner riding an elevator with a bag full of shredded paper. Respondent's motion is predicated on sheer speculation. Moreover, as Respondent's subpoena *duces tecum* is returnable at a hearing, and as the hearing has not yet taken place, Respondent's motion is not ripe. Accordingly, the Court denies Respondent's motion to hold Petitioner in contempt as such, without prejudice to renewal if Petitioner's contemptuously fails to comply with the subpoena. [11]

This case is now is a hearing-ready posture. The Court restores this matter for a hearing on April 15, 2016 at 9:30 a.m. in part C, Room 844 of the Courthouse located at 111 Centre Street, New York, New York.

***9** This constitutes the decision and order of this Court.

All Citations

50 Misc.3d 1220(A), 36 N.Y.S.3d 50 (Table), 2016 WL 688800, 2016 N.Y. Slip Op. 50181(U)

Footnotes

1 On this motion, the Court determines motion sequence number 5, brought by Petitioner seeking to quash subpoenas that Respondent and Petitioner's former counsel ("Petitioner's counsel") served upon it; motion sequence numbers 6 and 9, brought by Respondent seeking to quash subpoenas served upon her; motion sequence number 7, brought by Respondent seeking sanctions; motion sequence number 8, brought by Respondent seeking contempt; motion sequence number 10, seeking restoration of this matter to the Housing Court calendar; motion sequence number 11, brought by Respondent seeking to quash subpoenas, for sanctions, and for contempt; motion sequence numbers 12 and 13, brought by Petitioner and Petitioner's counsel seeking to vacate the Stipulation and the Order; and motion sequence number 14, brought by Respondent seeking sanctions.

2 The Court disposes of motion sequences number 10 this way.

3 As the Court granted the motion to the extent of a setting the motion down for hearing to determine what, if any, sanctions were appropriate to levy against Petitioner's counsel as well as Petitioner, Petitioner's counsel has since ceased to appear on Petitioner's behalf in this proceeding, Petitioner has retained a new attorney, and Petitioner's counsel appears on its own behalf in defense of the sanctions motion against it.

4 This section of the Code of Federal Regulations applies to housing subsidized according to 12 U.S.C. § 1701 *et seq.* 24 C.F .R. § 236.1(a).

5 The Court disposes of motion sequence numbers 12 and 13 this way.

6 The Court disposes of motion sequence numbers 6 and part of 11 of the matter this way.

7 The Court disposes of motion sequence numbers 7, part of 11, and 14 of the this matter this way.

8 The Court disposes of part of motion sequence number 11 this way.

9 Petitioner is a residential cooperative corporation.

10 The Court disposes of motion sequence number 5 of this matter this way.

11 The Court disposes of motion sequences number 9 this way.

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS **PART** 58
Justice

EVERCORE PARTNERS INC. and RALPH SCHLOSSTEIN

Plaintiffs,

-against-

LAZARD FRERES & CO., LLC,

Defendants.

INDEX NO. 109729/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to ____ were read on this motion for ____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-4
Answering Affidavits– Exhibits	5-6
Replying Affidavits	7-8

CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 10/28/11

DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

EVERCORE PARTNERS INC. and RALPH SCHLOSSTEIN,

Petitioner,

- against -

LAZARD FRERES & CO., LLC,

Respondent.

INDEX NO. 109729/11

DECISION/ORDER

FILED

NOV 02 2011

COUNTY CLERK'S OFFICE
NEW YORK

DONNA M. MILLS, J:

In this special proceeding, Petitioners Evercore Partners Inc. ("Evercore") and Ralph Schlosstein ("Schlosstein") (collectively "Petitioners"), apply for a protective order pursuant to New York Civil Practice Law and Rules ("CPLR") Article 75, CPLR 2304 and CPLR 3103 quashing the subpoena served by Respondent Lazard Freres & Co., LLC ("Respondent" or "Lazard") on March 3, 2011, which commands Mr. Schlosstein's appearance and attendance at an arbitrator's office to testify and give evidence in connection with a pending arbitration.

BACKGROUND

Respondent is engaged in an arbitration with F. Perkins Hixon, Jr. ("Hixon"), currently pending before the Arbitration Tribunals of the American Arbitration Association, International Centre for Dispute Resolution. Mr. Hixon is a former employee of Respondent and a current employee of Evercore. Petitioners are not parties to the Arbitration.

Evercore is an independent investment banking advisory firm. In its investment business, it manages billions of assets for a broad range of institutional and high net worth investors. Petitioner Schlosstein is currently employed as Evercore's President and Chief Executive Officer.

Mr. Hixon initiated the Arbitration against Respondent seeking severance pay and other compensation to which he claims to be entitled, in connection with the termination of his employment from Respondent pursuant to various employment agreements. Respondent counter-claimed, alleging Mr. Hixon is not entitled to any pay because he

breached restrictive covenants in his agreements with Respondent that prohibited him from soliciting Respondent's employees, allegedly by contacting several then-employees of Lazard about joining Mr. Hixon at Evercore.

A relevant outstanding issue in the Arbitration is whether Mr. Hixon's alleged breach of the non-solicitation covenants in his employment agreements constituted a material breach such that it relieved Respondent of its obligations to pay Mr. Hixon pursuant to those same employment agreements. Evercore contends that it has produced hundreds of pages of documents in response to a subpoena duces tecum. Respondent issued additional subpoenas ad testificatum to compel the appearance and testimony of three Evercore employees at the Arbitration, including Mr. Schlosstein. Evercore has agreed to produce the other two employees but considers it an undue burden to require its chief executive officer to testify, and has informed the Respondents that they will not make Mr. Schlosstein available.

Petitioners now seek a protective order from this Court quashing the subpoena. Petitioner's maintain that the subpoena is unreasonable and unduly burdensome and unjustified based on the matters at issue in the arbitration.

APPLICABLE LAW & DISCUSSION

Initially the Court notes that a distinction must be made between a subpoena duces tecum and a subpoena ad testificandum. A subpoena duces tecum refers only to books and records and will issue only in a proper case, i.e., when the requested documents bear a reasonable relationship to the subject matter of the investigation (Matter of Hirschfield v Craig, 239 NY 98; Carlisle v Bennett, 268 NY 212.) A subpoena ad testificandum, however, merely requires a witness to appear and give testimony subject to any evidentiary privilege or immunity which may be asserted at the time of the examination (*Matter of Hirschfield v Craig, supra*). While there may be judicial review of both types of subpoena, the focus of that inquiry usually differs. On a motion to quash a subpoena duces tecum the court is more often concerned with protecting litigants from a burdensome or an irrelevant demand and thus is more apt to intervene

at a preliminary stage. That justification is absent when considering a motion to quash a subpoena ad testificandum. Thus there is case law to the effect that the right to issue a subpoena ad testificandum is absolute (*Matter of Hirschfield v Craig, supra*). However, a subpoena ad testificandum may be quashed if issuance of such a subpoena was beyond the power of the agency or entity involved (Matter of Richardson, 247 NY 401), or if it is obvious that the subpoena seeks irrelevant or illegitimate information (Matter of Edge Ho Holding Corp., 256 NY 374, 381 [1931]).

The reason for the rule that on a motion to quash a subpoena the relevancy of the proposed testimony cannot be challenged was best stated by Chief Judge Cardozo in Matter of Edge Ho Holding Corp. at 381. The court in discussing the power to issue a subpoena ad testificandum stated, [T]hey [the power to subpoena] will be rendered to a large extent abortive if his subpoenas are to be quashed in advance of any hearing at the instance of unwilling witnesses upon forecasts of the testimony and nicely balanced arguments as to its probable importance." (Emphasis supplied.) The court thus felt that prophesying the probable importance of a witness would in effect destroy the very power to subpoena (see, also, Matter of Scheeler v Buffalo Wire Works Co., 50 Misc 2d 158).

Petitioners have asserted that there is no reason why one of the most senior officers of a significant investment bank should be forced to testify when he cannot provide any unique knowledge as to the contractual dispute before the arbitrator, particularly since he nor the institution he works for is a party to the arbitration. This Court finds, however, that based on the evidence already admitted in the arbitration proceeding, it is quite apparent that Schlosstein's numerous conversations with Hixon before hiring him, and his emails forwarded to other Evercore employees regarding the recruitment of Hixon and his former colleagues at Lazard is relevant and a legitimate

inquiry, notwithstanding Schlosstein's affidavit denying any specific recollection of the emails. And, while Schlosstein is a third-party witness, Lazard should not be deprived of his testimony simply because he happens not to be a party to the Arbitration.

For all reasons, herein, the motion to quash the subpoena is denied and the petition dismissed.

Dated: 10/29/11

ENTER:

J.S.C.

FILED

NOV 02 2011

NEW YORK
COUNTY CLERK'S OFFICE